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No. 08-227

In the Supreme Court of the United States

ANTONIO RAY LIDDELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Circuits Are In Conflict On The Question Presented 1

B. The Decision Below Departs From *Quarles* 4

C. This Case Presents An Appropriate Vehicle With Which To Address The Question Presented 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

New York v. *Quarles*,
467 U.S. 649 (1984) ..... *passim*

United States v. *Dutchie*,
2008 WL 4168423 (D. Utah Sept. 2, 2008) 1

United States v. *Jackson*,
No. 07-2510, 2008 WL 4499991 (1st Cir. Oct. 8, 2008) 1

United States v. *Leake*,
95 F.3d 409 (6th Cir. 1996) 8

United States v. *Melvin*,
2007 WL 2046735 (4th Cir. 2007) 2, 3

United States v. *Mobley*,
40 F.3d 688 (4th Cir. 1994) 2, 3

United States v. *Raborn*,
872 F.2d 589 (5th Cir. 1989) 2, 3, 4

United States v. *Williams*,
483 F.3d 425 (6th Cir. 2007) 2

REPLY BRIEF FOR PETITIONER

As Judge Gruender explained below, the courts of appeals are sharply divided on the scope and application of the "public safety" exception to *Miranda* that this Court recognized in *New York* v. *Quarles*, 467 U.S. 649 (1984). See Pet. App. 10a. This issue is a recurring one of substantial practical importance; indeed, since the filing of the petition for a writ of certiorari, two additional courts have addressed the question and rejected the reasoning used by the Eighth Circuit in this case. See *United States* v. *Jackson*, No. 07-2510, 2008 WL 4499991, at *6 n.9 (1st Cir. Oct. 8, 2008) (declining to apply public safety exception when gun "was clearly outside of the reach of Jackson, who was not even in the apartment and, in any event, was surrounded by a number of police officers"); *United States* v. *Dutchie*, 2008 WL 4168423, at *10 (D. Utah Sept. 2, 2008) (declining to apply the exception where "[t]he only identifiable suspects were already in custody, so they posed no threat" and "[t]he scene had been secured, inside and out"). The government's argument, meanwhile, itself confirms that the decision below departs substantially from the holding of *Quarles*. Further review therefore plainly is in order.

A. The Circuits Are In Conflict On The Question Presented

The government appears to recognize "tension" between the holding below and the decisions of other courts of appeals. Br. in Opp. 13. In fact, the conflict is clear and undeniable. The decisions of the Fourth, Fifth, and Sixth Circuits cited in the petition involved circumstances materially identical to those in this case. See Pet. 8-11. In those cases, as in this

one, the suspects had been arrested and taken into custody. In those cases, as in this one, the scene to be searched (premises or an automobile) had been secured by police officers. And in those cases, as in this one, neither the suspect nor anyone else had access to the area. Those other courts found that consideration dispositive, holding that the public safety exception comes into play only if the officer conducting the questioning has reason to believe "that someone other than police might gain access to [a hidden] weapon and inflict harm with it." *United States* v. *Williams*, 483 F.3d 425, 428 (6th Cir. 2007). See *United States* v. *Mobley*, 40 F.3d 688, 693 (4th Cir. 1994); *United States* v. *Melvin*, 2007 WL 2046735, at *11 (4th Cir. 2007); *United States* v. *Raborn*, 872 F.2d 589, 595 (5th Cir. 1989). The court below disagreed, holding the *Quarles* exception triggered whenever police officers fear they might come across something dangerous in the course of a search. See Pet. App. 5a.

The government nevertheless suggests that "[t]he cases petitioner cites involve circumstances that differ significantly from those in this case" (Br. in Opp. 11), although it carefully avoids suggesting that these purported differences actually had any bearing on the analysis used by the courts in those cases. The reason for the government's silence on this point is apparent: The distinctions offered by the government are illusory.

On examination, the government fails even to attempt to distinguish the Sixth Circuit's decision in *Williams*, acknowledging that court's rule that "the public safety exception would apply only if officers reasonably believed that the suspect had a weapon and that someone other than the police could gain

access to it." Br. in Opp. 12.[1] The government gets little farther with the Fourth Circuit's decisions in *Mobley* and *Melvin*. It appears to suggest that those decisions are distinguishable from the holding below because the questioning in those cases was "not intended to protect officers conducting a search incident to an arrest" (*id.* at 11), but that contention is baffling; in those cases, as in this one, arresting officers questioned a suspect who had just been taken into custody because they were concerned that dangerous items might turn up in a search of the suspect's apartment or vehicle. See *Mobley*, 40 F.3d at 693; *Melvin*, 2007 WL 2046735, at *8-*9, *11.[2] And the government cannot distinguish the Fifth Circuit's decision in *Raborn* on the ground that the defendant there "challenged the admission of the gun that was discovered under the seat cover in his truck, rather than his statement that it was located there." *Id.* at 13. The defendant's contention in *Raborn* actually was "that the court erred in admitting the pistol in evidence *because it was the fruit of questioning in violation of his Fifth Amendment*

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[1] The government may mean to suggest that the Sixth Circuit did not decide the scope of the public safety exception because it remanded the case for further factual findings. See Br. in Opp. 12 (court did not "resolv[e] whether the exception applied"). If so, the government is incorrect; the court of appeals set out the governing rule and, having done so, "remand[ed] the case to permit the district court to make the factual findings necessary to determine whether the public safety exception applies." 483 F.3d at 430.

[2] The government is incorrect in stating that "no circumstances in *Melvin* raised any specific concern on the part of the police about the presence of weapons in [the defendant's] truck"; law enforcement officers were aware that the defendant kept firearms in his vehicle. See 2007 WL 2046735, at *2.

rights" (872 F.2d at 595 (emphasis added)), a constitutional argument that parallels the one advanced by petitioner here.[3]

At bottom, there can be little doubt that the Eighth Circuit's understanding of *Miranda*'s public safety exception differs from that of the Fourth, Fifth, and Sixth Circuits, and that this case would have come out differently had it been decided by one of those courts. The government makes no serious contention to the contrary. For this reason alone, further review is warranted.

B. The Decision Below Departs From *Quarles*

In addition, as we also argue in the petition (at 13-17), the decision below departs from the rule of *Quarles* and substantially expands the public safety exception to *Miranda*. The Court in *Quarles* identified what it characterized as a "narrow" exception to *Miranda* that it applied where police officers "were confronted with the immediate necessity of ascertaining the whereabouts of a gun" and it would have been "untenable" to require the officers to choose "in a matter of seconds" whether or not to give *Miranda* warnings before trying to locate the weapon. 467 U.S. at 655, 657-658. That hardly describes the

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[3] The government also asserts that the Fifth Circuit's analysis of the public safety exception was "inconclusive dictum" because the court ultimately held the disputed evidence admissible on an inevitable-discovery theory. Br. in Opp. 13. But the court's discussion of the point was neither casual nor inconclusive; it specifically noted the government's reliance "on the public safety exception" of *Quarles* and found that exception inapplicable before ruling the disputed evidence admissible on alternative grounds. 872 F.2d at 595.

situation in a case like this one, where law enforcement officers were the only ones who had access to the vehicle subject to search and where (as the government appears to concede, see Br. in Opp. 9) the vehicle could have been impounded and searched by the officers at their leisure (as it in fact subsequently was).[4]

In defending the decision below, the government accordingly is forced to maintain that "the facts of *Quarles* itself did not involve an emergency of the kind petitioner suggests is required." Br. in Opp. 6. That argument, however, disregards the considerations that the *Quarles* Court described as crucial to application of the public safety exception. "So long as the gun [in *Quarles*] was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to

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[4] There is no basis for the government's assertion that the search in this case "involved some urgency." Br. in Opp. 7. See Pet. App. 9a-10a (Gruender, J., concurring) ("There was no evidence * * * supporting the necessity of an immediate search or continued search of the vehicle by the officers, either because of some immediate safety concern or because the vehicle was to be left unsecured by the roadside where the public might gain access to any weapon left in it. Because Liddell was arrested for driving while barred, there was no immediate danger that Liddell would be allowed to return to his car where he might have access to a hidden weapon. Furthermore, there was no evidence that the officers could not safely impound and tow Liddell's car in order to conduct a search of it at a later time."). The court of appeals' decisions cited by the government as favoring its position on this point (Br. in Opp. 7-8) offer it no support; those cases involved searches of the *persons* of arrested suspects, where there was an immediate need to conduct the search and remove dangerous items from the suspects' possession and control.

public safety: an accomplice might make use of it, a customer or employee might later come upon it." 467 U.S. at 657. The arresting officer in *Quarles* therefore "needed an answer to his question * * * to insure that further danger to the public did not result from the concealment of the gun in a public area." *Ibid.* The government's less urgent characterization of *Quarles* turns in large part on Justice Marshall's dissenting account of the record in that case (see Br. in Opp. 6-7), but the government omits Justice Marshall's understanding of the *actual holding* in *Quarles*: "The majority's analysis rests on the factual assumption that the public was at risk during Quarles' interrogation." 467 U.S. at 675 (Marshall, J., dissenting). Here, of course, no one had access to petitioner's car during his interrogation.

The decision below accordingly works a significant departure from the rule of *Quarles*. This Court held in *Quarles* (as did the Fourth, Fifth, and Sixth Circuits in their subsequent decisions applying the *Quarles* rule) that an exception to *Miranda* is warranted only when there are exigent circumstances and an urgent need for immediate questioning to preserve the public safety. The Eighth Circuit, in contrast, eliminated the immediacy and exigency elements from this test, holding simply that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." Pet. App. 5a. Because such a risk of injury is present in virtually all searches, the Eighth Circuit's rule vastly expands the range of circumstances in which law enforcement

officers may dispense with the requirements of *Miranda*.

The government denies that this is so because, in this case, officers had discovered a firearm before questioning petitioner, giving them what the government identifies as special grounds for concern. Br. in Opp. 8 (citing Pet. App. 5). But as we showed in the petition (at 17 & n.4), it will almost always be the case that law enforcement officers have reason to suspect that they may come across a firearm or other dangerous item during the search of a home or vehicle. Under the Eighth Circuit's rule, that possibility triggers the public safety exception. The government makes no response to this point. But if the rule of *Quarles* is to be expanded in such a dramatic fashion, this Court, and not the Eighth Circuit, should be the one to take that step.

C. This Case Presents An Appropriate Vehicle With Which To Address The Question Presented

Finally, the government is wrong in contending that review should be denied because petitioner would be unable to withdraw his guilty plea even if he prevails in this Court on the public safety exception issue. Br. in Opp. 13. The statement elicited from petitioner by police questioning – that he knew there was a gun in the car he was driving, but that it was not his weapon – was central to the felon-in-possession charge against him. Indeed, petitioner entered a conditional guilty plea after denial of his suppression motion, and the only issue he presented on appeal was the admissibility of his statement to the arresting officer. See Pet. App. 2a-3a. There accordingly is every reason to believe that exclusion of

the statement "would have had a material effect on the defendant's decision to plead guilty" (*United States* v. *Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996)), which the government recognizes to be the controlling test. Br. in Opp. 14.

In fact, this case is an ideal vehicle with which to resolve the question presented. The facts are undisputed and the record is simple. See Pet. App. 2a, 9a-10a. And those facts present the paradigm of the situation on which the courts are in conflict: At the time he was subject to questioning, petitioner was handcuffed and in custody, he presented no threat to anyone, and no one other than law enforcement officers had access to the vehicle subject to search. See *id.* at 9a. This Court should address the recurring question whether the dictates of *Miranda* may be disregarded in such circumstances.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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